

(b) If the case is not settled, the parties shall report whether they wish to participate in mediation to be conducted by a magistrate judge, by this court, or by a private mediator.

(c) If the case is not settled and the parties do not wish to engage in mediation, they shall submit, jointly if possible and separately if necessary, a proposed schedule for future proceedings in this case.

6. If necessary, a scheduling conference shall be held on August 6, 2012 at 4:00 p.m. Representatives of each party with full settlement authority shall attend.

/s/ Mark L. Wolf
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

No. 1:07-cv-10066-MLW

VINCENT DeGIOVANNI, on behalf of himself and all other
similarly-situated individuals,
Plaintiffs

vs.

JANI-KING INTERNATIONAL, INC., et al,
Defendants

For Hearing Before:
Chief Judge Mark L. Wolf

Summary Judgment

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, June 6, 2012

REPORTER: RICHARD H. ROMANOW, RPR
Official Court Reporter
United States District Court
One Courthouse Way, Room 5200, Boston, MA 02210
bulldog@richromanow.com

A P P E A R A N C E S

SHANNON E. LISS-RIORDAN, ESQ
HILLARY A. SCHWAB, ESQ.
STEPHEN S. CHURCHILL, ESQ.
Lichten & Liss-Riordan, P.C.
100 Cambridge Street, 20th Floor
Boston, Massachusetts 02114
(617) 994-5800
Email: Sliss@llrlaw.com
For plaintiffs

AARON D. Van OORT, ESQ.
KERRY L. BUNDY, ESQ.
Faegre Baker Daniels, LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-3901
(612) 766-7000
Email: Aaron.vanoort@faegrebd.com

and
GREGG A. RUBENSTEIN, ESQ.
Nixon Peabody, LLP
100 Summer Street
Boston, Massachusetts 02110-2131
(617) 345-6184
Email: Grubenstein@nixonpeabody.com
For Defendants

P R O C E E D I N G S

(Begins, 3:00 p.m.)

THE CLERK: Civil Action 07-10066, Vincent
DeGiovanni versus Jani-King International, Inc. The
Court is in session. You may be seated.

THE COURT: Good afternoon. Would counsel
please identify themselves for the Court and for the
record.

MS. LISS-RIORDAN: Good afternoon, your Honor.
For the plaintiffs, I'm Shannon Liss-Riordan.

MR. CHURCHILL: And Stephen Churchill, your
Honor.

MS. SCHWAB: And Hillary Schwab. Good
afternoon.

MR. RUBENSTEIN: Good afternoon, your Honor.
For the defendants, Greg Rubenstein of Nixon Peabody,
local counsel.

MS. BUNDY: And Kerry Bundy and Aaron Van
Oort, from Faegre Baker and Daniels.

THE COURT: Okay. We're here today for
argument and, I expect, decision on the pending
motions. There are cross-motions for summary judgment
with regard to whether the plaintiffs were misclassified
as independent contractors rather than employees under
Mass. General Law, Chapter 149, Section 148B, and

Coverall, North America.

THE COURT: So this is on the damages question
Judge Young certified?

MS. LISS-RIORDAN: This is on the damages
question. And based on this decision, even the damages
are now determinable on a class-wide basis without the
need for individualized inquiry because the data comes
straight out of the company's computer, how much were
charged in franchise fees, how much were charged in
additional business fees, and how much were charged in
insurance payments.

THE COURT: All right. I'm going to take a
recess. Unless I get diverted, I'll be back in about 10
minutes or so and let you know where we are and where
we're going. Either I'll rule or I'll take the matter
under advisement. We'll see.

The Court is in recess.

(Recess, 4:45 p.m.)

(Resumed, 5:15 p.m.)

THE COURT: Sometimes arguments make things
more clear, but as has happened in this case before, the
elegant arguments today have made them more complicated,
um, but if we had to wait until I was positive about
some of these issues, the case wouldn't progress. So I
have studied this intensively in advance of the

1 hearing. I'm going to give you my decision orally. I
 2 hope that the level of detail, among other things, will
 3 indicate it has not been reached casually. And I'm
 4 going to decide the issues essentially as they were
 5 defined by the parties in this motion for summary
 6 judgment which make no serious effort to distinguish
 7 between the three defendants who are collectively
 8 referred to as "Jani-King."

9 For the reasons I'll describe, I find there are no
 10 material facts in dispute with regard to the issue under
 11 Chapter 148B and that a reasonable factfinder could not
 12 find that the members of the plaintiff class were
 13 independent contractors -- and I'm talking shorthand, so
 14 they're entitled to be treated as employees for the
 15 purpose of 148B.

16 I'm not going to decertify the class that Judge
 17 Young certified and I believe I clarified the definition
 18 of the class. However, as the parties recognize and as
 19 Rule 23 provides, the class can be altered or the order
 20 certifying the class can be amended at any point. And I
 21 think some of the issues raised today go at a minimum to
 22 the typicality of the named plaintiffs, although I think
 23 that's an issue that Judge Young addressed in his
 24 decision certifying the class, which is the law of the
 25 case. So I'm deciding the matters that have been put to

1 me today based on the record I have before me, but there
 2 may be further evolution.

3 The transcript will be a record of the decision.
 4 It's possible that at some point I'll convert the
 5 transcript into a more formal memorandum and order. But
 6 you should assume that once it's corrected, um, to
 7 assure the Court Reporter hasn't misunderstood anything
 8 I'm saying, um, it will be the record of the decision for
 9 the foreseeable future.

10 By way of summary, this case is brought by
 11 janitorial workers characterized as franchise workers
 12 who, among other things, alleged that the defendants
 13 misclassified them as independent contractors, although
 14 they were in fact employees under Massachusetts General
 15 Law Chapter 149, Section 148B. The plaintiffs claim
 16 that the defendants, collectively referred to as "Jani-
 17 King" throughout these summary judgment papers, by both
 18 sides, perpetuated abuses that are typical of commercial
 19 cleaning franchise systems. Specifically it is alleged
 20 that the defendants targeted immigrants, having limited
 21 ability to speak English, lured them with the false
 22 promise that they would achieve the American dream
 23 through ownership of a small business, and then
 24 collected excessive fees in return for providing them
 25 nothing more than a low-paying janitorial job.

1 The parties, after discovery, are limited to the
 2 pertinent issue, but relevant, I'm sure, to related
 3 issues, have each filed cross-motions for summary
 4 judgment on the second prong of the three-prong test
 5 that a putative employer must satisfy in order to
 6 demonstrate that a worker is an independent contractor
 7 and not an employee. That prong requires the defendants
 8 to show that the plaintiffs are performing a service,
 9 quote, "outside the usual course of the business of the
 10 employer." That's Mass. General Law, Chapter 149,
 11 Section 148B(a)(2). Defendants have also moved to
 12 decertify the class that was certified earlier in this
 13 litigation.

14 Plaintiffs, in essence, argue that this case
 15 represents a straightforward application of the
 16 misclassification test. They claim the defendants
 17 created and operated a commercial cleaning franchise
 18 system, but are in the business of commercial cleaning,
 19 and plaintiffs' work is performed within the usual
 20 course of that business. This is the conclusion that my
 21 colleague, Judge William Young, reached in another case
 22 involving commercial cleaning franchises, *Awuah vs.*
 23 *Coverall*, 707 F. Supp. 2d 80, at 84. The defendants,
 24 however, argue that Jani-King's course of business is
 25 different than that of the franchise owners because

1 they're at different levels of the distribution system
 2 for cleaning services. Specifically they argue that
 3 Jani-King develops a cleaning system and promotes and
 4 maintains the Jani-King brand, whereas the plaintiffs
 5 provide cleaning services. Moreover, the defendants
 6 argue that interpreting Section 148B(a)(2) in a manner
 7 that places a franchisor and a franchisee in the same
 8 "course of business" would altogether abolish
 9 franchising in Massachusetts.

10 As I will explain, I find that the plaintiffs are
 11 entitled to summary judgment because the undisputed
 12 facts show that the plaintiffs provide commercial
 13 cleaning services within the usual course of the
 14 business of the defendants, particularly Jani-King of
 15 Boston. In addition, I find that the defendants have
 16 not shown that decertification of the class is warranted
 17 at this time.

18 The standard for determining whether a grant of
 19 summary judgment is appropriate is familiar. The Court
 20 must look at the admissible evidence and view the facts
 21 in the light most favorable to the nonmoving party.
 22 Where as here there are cross-motions for summary
 23 judgment, it's possible that neither party would be
 24 entitled to summary judgment. I've considered that, but
 25 I find that the plaintiffs are entitled to summary

1 judgment.

2 When a party fails to make a showing sufficient to
3 establish the existence of an element essential to that
4 party's case and on which that party bears the burden of
5 proof at trial, there can no longer be a genuine issue
6 as to any material fact and the moving party is entitled
7 to judgment as a matter of law.

8 In determining the merits of a motion for summary
9 judgment, the court is compelled to undertake two
10 inquiries, one, whether the factual disputes are
11 genuine, that is, whether admissible evidence puts one
12 into dispute, and whether any fact genuinely in dispute
13 is material. As to materiality, the substantive law
14 will identify which facts are material. Only disputes
15 over facts that might affect the outcome of the suit
16 under the governing law properly preclude the entry of
17 summary judgment. To determine if a dispute about a
18 material fact is genuine, the court must decide whether
19 the evidence is such that a reasonable factfinder could
20 return a verdict for the nonmoving party and the
21 evidence must be admissible evidence.

22 With regard to the applicable law of this case,
23 the Massachusetts independent contractor statute
24 provides that an individual performing a service shall
25 be considered an employee unless the three statutory

1 criteria of Section 148B are satisfied, as explained by
2 the Supreme Judicial Court in *Somers*, 454 Mass. 582, at
3 589. With regard to the statute specifically, it
4 provides that: "An individual performing any service,
5 except as authorized under this section, shall be
6 considered an employee unless," and then there are three
7 provisions. In the second provision, which is the issue
8 here, it states that "The service is performed outside
9 the usual course of the business of the employer."

10 The SJC explained in *Somers* that "A legislative
11 purpose behind the independent contractor statute is to
12 protect employees from being deprived of the benefits
13 enjoyed by employees through their misclassification as
14 independent contractors." In *Somers*, the SJC
15 acknowledged that the legislature might have written the
16 independent contractor statute to provide greater
17 protection for employers, but it did not do so. That's
18 454 Mass. at 592. As the SJC said in *Somers* as well,
19 Section 148B places the burden on the employer to prove
20 the three prongs of the test by a preponderance of the
21 evidence. "The failure of the employer to prove all
22 three criteria set forth suffices to establish that the
23 individual in question is an employee."

24 In 2008, the Attorney General of the Commonwealth
25 of Massachusetts issued an advisory from her Fair Labor

1 Division on Mass. General Law, Chapter 149, Section
2 148B. The Supreme Judicial Court, in a series of
3 decisions, has held that the Attorney General's
4 interpretation of the statute is entitled to substantial
5 deference. It said that in *Electronic Data Systems*, 454
6 Mass. 63 at 64 and 69, and significantly also in *Smith*
7 *vs. Winter Place*, 447 Mass. 363 at 367 to 368. There
8 the SJC stated, quote: "Insofar as the Attorney
9 General's Office is the department charged with
10 enforcing the wage and hour laws, its interpretations of
11 the protections provided thereunder is entitled to
12 substantial deference, at least where it is not
13 inconsistent with the plain language of the statutory
14 provisions."

15 The Attorney General's Office has stated that in
16 interpreting the second prong of the Section 148B test,
17 that it will consider whether the service provided is
18 "necessary to the business" or "merely incidental to
19 it." That's at Page 6 of the advisory citing the
20 Illinois decision in *Carpetland*, 201 Ill. 2d 351 at
21 386. Of course, many services are clearly necessary to
22 a business but might still be incidental to it, such as
23 repairing an electrical system for a law office that is
24 without power. However, the examples provided by
25 the Attorney General are illustrative.

1 The Attorney General's advisory states that it
2 would violate Prong 2 if "a drywall company classifies
3 an individual who is installing drywall as an
4 independent contractor" or if "a company in the business
5 of providing motor vehicle appraisals classifies an
6 individual appraiser as an independent contractor." In
7 each of these cases, the individual, quote, "is
8 performing an essential part of the employer's
9 business," end quote.

10 However, an accounting firm may classify an
11 individual who was hired to move office furniture as an
12 independent contractor without running afoul of Prong 2,
13 because "the moving of furniture," the Attorney General
14 says, "is incidental and not necessary to the accounting
15 firm's business."

16 It's been argued today and I've considered the
17 argument that in the same advisory, on Page 5, um, that
18 the Attorney General indicates it would not be a
19 violation of the statute for the following to occur.
20 "If Painting Company X cannot finish a painting job and
21 hires Painting Company Y as a subcontractor to finish
22 the painting job, provided that all of the individuals
23 performing the painting are employees of Company Y, then
24 the law does not apply. However, if Painting Company X
25 hires individuals as independent contractors to finish

the painting job, then this would be a violation of Prong 2 and a misclassification under the law."

I think read together with the examples of the drywall company and the motor vehicle appraisals is, um, the requirement to look at the way an organization usually or ordinarily does business. With regard to the painting company, ordinarily Company X has employees that do all the necessary painting that it is undertaking to do, but if it finds it cannot finish a job with its own employees, it might occasionally and properly hire somebody who can accurately be characterized as an independent contractor to finish the work.

On the other hand, the examples of misclassification under Prong 2 guidelines, on Page 6 of the advisory, has referred to, as I understand it, a drywall company that regularly characterizes the people installing drywall as independent contractors or a company in the business of providing motor vehicle appraisals regularly classifying individuals who do those appraisals, the heart of its business, as independent contractors.

In this case, there are several legal entities each with Jani-King in its name that are defendants. The way the motion for summary judgment has been -- the

motions for summary judgment were presented and argued, this time, treats them essentially as a single entity. As I said at the outset today, it's conceivable in some cases there could be distinctions between different related organizations as to whether they're employers with employees for the purpose of this wage statute. In fact, I believe I have a case raising that issue called **Jan-Pro** that I have to get back to. It's another one of Ms. Liss-Riordan's cases. But I'm going to decide this as the parties have argued it, essentially as an all-or-nothing proposition, and I find that the material undisputed facts making the members of the plaintiff class employees for the purpose of the misclassification statute include the following.

The Jani-King franchise system allows franchise owners to obtain a license to use Jani-King's brand, trademarks, and proprietary methods to operate commercial cleaning businesses. And these essentially come from the parties' statements of facts, undisputed facts.

I will refer to Jani-King International as "JKI" and Jani-King of Boston at times as "Jani-King, Boston," and "JKB."

But JKI is the architect of the Jani-King franchising system. It is involved in franchising only

one type of business, commercial cleaning. JKI is the parent company of its wholly-owned subsidiary, Jani-King, Inc. Jani-King, Inc. wholly owns 18 regional subsidiaries, also called "corporate regional offices," one of which is Jani-King, Boston, or JKB. Neither JKI nor Jani-King, Inc. directly sells franchises.

JKI develops proprietary methods and materials and provides oversight and support to the regional offices. JKI maintains and protects the company's trademarks and trade names. It owns the intellectual property that is derived from its development of proprietary methods and materials. JKI's trademarks and proprietary information are licensed to franchise owners.

JKI engages in nationwide and regional marketing to promote the Jani-King brand and franchise system. It also maintains a website to promote the Jani-King franchise system and brand to prospective owners and clients, and publishes a monthly newsletter for use by corporate regional offices and franchise owners. As part of its marketing, Jani-King promotes the Jani-King brand as the, quote, "King of Clean," end quote.

Part of JKI's role as architect of the Jani-King franchise system is to continue developing and refining the Jani-King methods and materials that form the foundation of the Jani-King franchise system. All of

JKI's departments are involved in preparing training materials for cleaners, including materials about training techniques. JKI has two specialty departments, healthcare and hospitality, both of which develop training materials about proper cleaning procedures. JKI regularly develops cleaning methods, procedures, marketing materials, and training materials that are summarized in various manuals, DVDs, and brochures. These are used by the regional offices to provide initial and ongoing training to franchise owners and are used by franchise owners in the course of their work.

JKI oversees the management and operation of the JKB, the Jani-King Boston, office. As part of its oversight of the corporate regional offices, JKI employs directors of corporate development who take the lead role in hiring regional directors for each regional office and maintaining regular contact with these directors to ensure that the regional offices are operated in accordance with the guidelines established by JKI.

JKI provides policies, procedures, forms, training materials, marketing materials, reporting requirements, and other guidelines for JKB's operations. It sends employees to regional offices to provide advice on new cleaning methods, among other subjects. JKI also sends

employees with operations experience to corporate regional offices to assist with various management issues. JKI holds annual conferences for regional directors. In addition, JKB staff receives training in conferences held either at JKB or at JKI.

JKI trains regional office staff in its proprietary bidding methods, which are developed and maintained by a full-time bidding expert employed by JKI. This expert also assists regional offices with large bids and bids national accounts. In addition, JKI maintains a proprietary accounting software system which is used to provide accounting services to franchise owners. JKI uses this software to generate monthly franchise reports which are distributed to franchise owners by the corporate regional offices each month.

JKI prepares all franchise agreement forms. In addition, one of JKI's central obligations is to draft and file, on an annual basis for each state with a corporate regional office, a franchise disclosure statement which is mandated by the Federal Trade Commission.

Importantly, JKB implements the franchising system developed by JKI. According to the estimate of its regional director in January of 2011, JKB served about 550 to 570 cleaning accounts and has about 120 of what

it calls "franchisees."

JKB provides advertising, accounting, and periodic operational support to franchise owners. As a normal part of JKB's day-to-day operations, JKB employees regularly interact with franchise owners to assist them in the operation of their franchise business, which may include offering suggestions regarding how to address a disagreement with a client, how to address a unique cleaning issue, and how to solicit and bid accounts.

JKB works to obtain commercial cleaning contracts to be serviced by so-called "franchise owners." JKB is a contracting party to the cleaning contracts. JKB personnel maintain customer account information and are responsible for billing and collecting money from clients. Clients send payments directly to JKB. Clients may contact a Jani-King representative to discuss any issue that arises. On occasion, operation managers have arranged for a subcontractor to provide cleaning services to an account, such as where no franchise owner was willing to accommodate the client's schedule.

As of 2011, JKB had 10 employees, three operations personnel, three sales staff, called "account executives," three administrative staff, and a regional director. Sales staff seek to develop cleaning accounts

and may also work with existing clients to revise bids if the scope of work changes. The administrative staff field calls from cleaning clients and handle client accounting and billing. Operations personnel spend much of their time in the field inspecting accounts, dealing with issues relating to customer accounts, and meeting with customers and franchise owners. They provide franchise owners with start-up help and may provide ongoing advice about cleaning tasks. They arrange for newly-acquired accounts to be serviced by franchise owners and also oversee the transition of existing accounts from one franchise owner to another in the event an account is transferred. JKB operations managers also work with clients and franchise owners on an ongoing basis to provide quality control and "to assure that the client is receiving the promised benefits of the Jani-King franchising system."

JKB provides the Massachusetts Franchise Disclosure Document, prepared by JKI, to all prospective owners who inquire about purchasing a franchise, and uses other materials prepared by JKI, including a promotional video and brochure. JKB places ads in local periodicals aimed at prospective franchise owners.

When a person buys a franchise in the JKB region, a franchise agreement is executed by the purchaser.

Actually, let me take a step back. I said earlier that JKB signs or enters into all the maintenance agreements. Exhibit U to the Churchill affidavit is a representative Jani-King maintenance agreement. It is between Jani-King of Boston and a client called Over The Rainbow. It starts by saying: "Whereas Jani-King is in the business of providing commercial cleaning and maintenance services," and then it goes on to describe the services and the terms of which it will be provided.

As I said, when a person buys a franchise in the JKB region, a franchise agreement is executed by the purchaser and JKB. Exhibit S to the Churchill affidavit is an example of such an agreement. Jani-King does not negotiate the terms of written agreements with franchise owners in Massachusetts. JKB provides paperwork to interested franchise owners in advance of a sale and then meets with the interested franchisee in order to answer questions, execute the paperwork, and complete the sale. When JKB sells a franchise, it submits all completed paperwork to JKI for review.

Franchise owners are required to comply with Jani-King policies and procedures. However, franchise owners decide, among other things, what accounts to accept, how to staff them, whether to hire employees and whom to hire, whether to treat their employees as independent

1 contractors, whether to solicit new accounts, what
2 equipment to purchase or when to service accounts and in
3 what order, um, subject to parameters set by the
4 client.

5 Jani-King provides franchise owners with training
6 regarding Jani-King's proprietary cleaning system and
7 procedures. This training is provided by several JKB
8 employees. In addition, Jani-King provides franchise
9 owners with written materials, including information
10 about cleaning methods and techniques.

11 Franchise owners must pay fees to Jani-King on all
12 commercial cleaning they service. Jani-King also
13 obtains revenue by leasing cleaning equipment to
14 franchise owners and receives some payment in connection
15 with the purchase of equipment by franchise owners
16 through Jani-King. New franchise owners typically
17 obtain required cleaning equipment by leasing it from
18 Jani-King.

19 For a fee, corporate regional offices provide
20 billing and accounting functions for each franchise
21 owner. The revenue generated from the cleaning services
22 provided by each franchise is distributed to each owner
23 with the monthly franchisee report after royalties and
24 fees due to the corporate office had been taken out.
25 Franchise owners are invited to the regional office to

1 pick up their monthly franchisee reports and franchise
2 revenue in a monthly "franchisee day."

3 The Jani-King website offers, quote, "commercial
4 cleaning services," end quote, and states that, quote,
5 "Jani-King understands the world of commercial
6 cleaning," end quote, and that, quote, "Jani-King is the
7 global leader in commercial cleaning services," end
8 quote, and that Jani-King is, quote, "ranked the world's
9 No. 1 commercial cleaning franchise company year after
10 year," end quote.

11 A job opening for "JKI Director of Operations"
12 stated that the "applicant must have extensive
13 commercial cleaning experience." Prior to working for
14 JKB, Operations Manager Joe Mota worked for over 18
15 years as a cleaning supervisor and had "a lot of
16 knowledge" about the cleaning industry. Mota hired an
17 assistant with a background in cleaning and the
18 background is important to Mota because the assistant
19 "had the experience in order to properly train and
20 advise the franchisee owners."

21 In addition, Jani-King's franchise agreement
22 states that JKB, quote, "is in the business of operating
23 and franchising professional cleaning and maintenance
24 businesses," end quote. In its cleaning contracts with
25 clients, Jani-King states -- and that's actually Jani-

1 King of Boston specifically, as I said earlier, that
2 JKB, quote, "is in the business of providing commercial
3 cleaning and maintenance services."

4 On these undisputed facts, a reasonable factfinder
5 would have to conclude that the defendants have not
6 proven, under the Attorney General's interpretation of
7 145B(a)(2), that Jani-King Boston and indeed all the
8 defendants -- well, let me restate this.

9 Under the Attorney General's interpretation of
10 Section 145B(a)(2), a reasonable factfinder would have
11 to conclude that the business of Jani-King, Boston and
12 the defendants generally is as stated in its standard
13 maintenance agreement, that is, "to provide cleaning
14 services." People who clean and/or get others to clean
15 are essential to this business. Therefore, like the
16 drywallers or people in the motor vehicle appraisal
17 business, the people who do cleaning would be employees
18 rather than independent contractors. This is the way
19 the undisputed facts show Jani-King regularly does the
20 cleaning business it regularly asserts it is in. It is
21 not an exception when it goes to somebody who's called
22 an "independent contractor." It is the usual way of
23 providing cleaning services and the cleaners are
24 essential to the business of Jani-King, Boston and all
25 of the Jani-King entities.

1 This is the conclusion that Judge Young reached in
2 **Awuah**, 707 F. Supp. 2d at 84, a comparable case with
3 similar facts regarding cleaners. It is also analogous
4 to a series of Massachusetts cases involving exotic
5 dancers -- strippers, to be more direct. In those cases
6 clubs have argued that they're in the business of
7 serving food and alcohol from which they derive most of
8 the revenue and they merely provide a stage for
9 independent performers who are compensated by
10 customers. Massachusetts courts have regularly rejected
11 this argument and found misclassification and granted
12 summary judgment to the dancers in cases such as
13 **Monteiro**, 2011 Westlaw 7090703, **Jenks**, 2011 Westlaw
14 3930190, and **Sandoval**, 2011 Westlaw 5517331.

15 These courts reason that although the clubs derive
16 their revenue largely from the sale of alcohol, the
17 presence of the dancers is designed to bring in
18 customers and to further the sale of alcoholic
19 beverages. Therefore, as said in **Sandoval**, "the dancers
20 are an integral part of the club's business." Alcohol
21 and exotic dancing in these cases are "together and
22 intertwined" and "both clearly comprise the adult
23 entertainment portfolio," of the establishment, as said
24 in **Jenks**. Indeed, as the Court wrote in **Jenks**, "It is
25 incredulous to conceive that the plaintiffs perform

1 their services -- nude dancing -- outside the Golden
2 Banana's usual course of business, when the club's
3 website advertises as 'gorgeous, totally nude dancers'."

4 This case is also analogous to cases arising from
5 other industries, including *Rainbow Development*, 2005
6 Westlaw 3543770. There the Court explained that "The
7 workers are engaged in the exact business Auto Shine is
8 engaged in. Auto Shine merely provides the
9 administration. Without the services of the workers,"
10 who did all of the detailing, "Auto Shine would cease to
11 operate." Similarly, in *Oliveira*, 2010 Westlaw 4071360,
12 the Court rejected an employer's attempt to claim that
13 it was merely -- that it merely managed the delivery of
14 furniture for retailers while independent owner-
15 operators performed the actual deliveries. The Court
16 found that summary judgment was justified for the
17 plaintiff on the second prong where, quote, "without
18 providing physical delivery of furniture, which is
19 essential to its business, the defendant's business
20 would not exist."

21 The analysis used in the Attorney General's
22 advisory and existing case law as well as the plain
23 language of Section 148B indicates that the plaintiffs
24 are entitled to summary judgment on Prong 2. As
25 discussed a moment ago, those authorities focus the

1 inquiry on the core of the service provided by the
2 business. Jani-King develops proprietary cleaning
3 methods, holds itself out as a leader in commercial
4 cleaning, and contracts directly with customers to
5 provide commercial cleaning services.

6 Indeed, Jani-King does not attempt to really
7 argue, if I understand it right, that it's not in the
8 commercial cleaning business. Rather it attempts to
9 create a distinction between different levels in the
10 distribution of the service arguing that the function it
11 performs is not cleaning but developing a cleaning
12 system and promoting the brand. To this end, the
13 defendants point out that franchise owners do not
14 perform the same tasks that they perform because they do
15 not sell franchises, bill clients, or develop
16 proprietary materials. However, this contention is
17 inconsistent with the statutory test's focus on the
18 nature of the service provided by the business. If the
19 separation of executive and managerial functions were
20 sufficient to take the service provided by workers
21 outside the course of a business, Prong 2 would easily
22 be evaded precisely after the legislature, in 2004, has
23 made it -- had sought to make it harder to circumvent.
24 This type of argument was rightly rejected in *Rainbow*
25 and in *Oliveira*. As was true in those cases, the

1 plaintiffs in this case provide the core service that
2 Jani-King offers and "without the services of the
3 workers, Jani-King would cease to operate," were the
4 words of *Rainbow*.

5 The defendants ardently argue that this analysis
6 of the statute would be fatal to franchising in
7 Massachusetts. To that I would say two things. First,
8 under this analysis, it's not sufficient to show that
9 Jani-King and the people who do the cleaning are in the
10 same business. The issue is what is the usual course of
11 the business of the defendant.

12 It is possible that some case -- although not in
13 this case as it's been presented to me on the undisputed
14 facts I've just cited, but I note that the statute does
15 not ask about whether a service is performed in Jani-
16 King's, quote, "usual course of business," it asks
17 whether the service is performed in "the usual course of
18 the business" of Jani-King. This wording is unusual.
19 Arguably it would be more natural to speak "of the
20 course of business of the employer" than "the course of
21 the business of the employer." Arguably this difference
22 signals something about the level of specificity to the
23 inquiry, which could mean that the test does not ask
24 about Jani-King's business in the general sense, as in
25 the usual course of the business that it regularly

1 conducts, but instead in the very specific sense as in
2 the specific dealings and transactions that make up its
3 business.

4 In the case of Jani-King, the service provided by
5 the franchisees is certainly the business of the
6 regional office, Jani-King, Boston. The clients of the
7 franchisees are the clients of Jani-King, Boston. The
8 regional office contracts with them and collects
9 payments from them, the regional office monitors and
10 inspects the service that they are getting because that
11 is its business. And when a franchisee provides a
12 cleaning, it is acting in the course of the business of
13 Jani-King, Boston.

14 In contrast, arguably, in the case of a franchise
15 such as Burger King, the connection is more remote. For
16 both Burger King and its franchisees the usual course of
17 business involves the sale of fast food, yet the
18 transactions of the franchisee share no specific
19 connection to the franchisor. Thus, when individual
20 franchisees sell a Whopper to a customer, he's not doing
21 the specific business of any other Burger King entity
22 even if he's doing the business of Burger King in the
23 general sense. That may be a distinction that would
24 make a difference in some case, though not in this
25 case.

1 It may be that the statute, as it was amended in
2 2004, makes it difficult for the franchisor/franchisee
3 model to operate in Massachusetts. However, it's the
4 duty of the Court to interpret the statute as it's been
5 written, as it's been authoritatively interpreted by the
6 Attorney General, and to apply that meaning. If there
7 are arguably unfortunate practical and policy
8 implications to the way the statute, properly
9 interpreted, operates, it's the duty of the legislature,
10 not the Court, to create exemptions and exceptions.

11 So for those reasons, summary judgment for the
12 plaintiffs is allowed.

13 In addition, I've decided it's not appropriate to
14 decertify the class originally certified by Judge Young
15 and as subsequently clarified when the case was
16 transferred to me. Rule 23(c)(1)(C) permits the Court
17 to amend the class certification or alter the order.
18 However, law-of-the-case principles generally apply.
19 Ordinarily getting a new judge is not an adequate reason
20 for an earlier decision in a case to be reconsidered.
21 However, as held in *Negron-Almeda*, 579 F.3d at 51 to 52,
22 if controlling legal authority has changed in a material
23 way, that would be a proper basis to revise or
24 reconsider and revise a prior ruling.

25 The defendants argue that the Supreme Court's

1 decision in *Wal-Mart* is such a change in controlling
2 legal authority. I find that is not correct. *Wal-Mart*
3 really only applies the Supreme Court's standard for
4 commonality created or recognized in the Supreme Court's
5 *Falcon* decision. In *Wal-Mart*, the Supreme Court said
6 the claims of class members "must depend upon a common
7 contention capable of class-wide resolution, which means
8 that determination of its truth or falsity would resolve
9 an issue that is central to the validity of each one of
10 the claims in one stroke."

11 In this case, that common issue is whether the
12 cleaners are employees or independent contractors. The
13 plaintiffs in this case have done what the *Wal-Mart*
14 plaintiffs did not. They challenge a general policy of
15 classifying cleaning workers as independent contractors
16 implemented through a standard franchise agreement that
17 was used by Jani-King to define its relationship to all
18 of the class members in this case. In *Wal-Mart*, the
19 discrimination, the employment discrimination was
20 alleged on a nationwide basis. If it existed, it would
21 have resulted from the decisions of numerous decision-
22 makers. This case, however, on its undisputed facts,
23 involves a uniform practice.

24 The deposition testimony that's been brought to my
25 attention I find does not alter this fundamental

1 conclusion or doesn't alter the conclusions I've reached
2 with regard to Prong 2 of Section 148. However, I've
3 begun to get educated to understand that the claims of
4 some of the class plaintiffs arguably may not be typical
5 of the class as a whole. Judge Young addressed this in
6 his original class certification decision, but it's
7 possible, as this comes into clearer focus, a narrowing
8 of the class or the elimination of some of the present
9 four-named class representatives would be appropriate.
10 But I'm not deciding any such thing now.

11 So those are my rulings and the question is where
12 do we go from here? I think, um -- and not just because
13 it's 5 minutes after 6:00, that I'm going to order that
14 you absorb this. I'd like to give you a couple of weeks
15 to confer and ideally propose jointly how we would
16 proceed, but if that proves to be impossible, since you
17 haven't agreed on much yet, um, then separately how we
18 should proceed, to make a submission to me, and then
19 I'll see you all again.

20 What would be, you know, a reasonable time to give
21 you to talk about the practical implications of this and
22 the plaintiff has said that the plaintiffs may want to
23 drop certain claims, for example? You know, you want to
24 figure out what's -- you need to talk about what's going
25 to remain in the case and that would affect what needs

1 to be done. I mean, I -- my goal's to put this on the
2 schedule so I can see you in early August, knowing what
3 my schedule is.

4 So how much time do you want to absorb this, to
5 have serious discussions, also about whether you can
6 settle the case?

7 MR. van OORT: Your Honor, you can tell us how
8 much in advance you'd like the papers to you so that you
9 can prepare for us in August?

10 THE COURT: Yeah, early August, but I don't
11 want to foul up any -- well, I'd say I could give you
12 say till -- I could give you until July 20th maybe or
13 even a little longer and I'll see you on the afternoon
14 of maybe August 6th, unless somebody has a foreseeable
15 conflict.

16 MR. van OORT: Let me check, your Honor.

17 MS. LISS-RIORDAN: That's fine on our end.

18 (Pause.)

19 MR. van OORT: Your Honor, we don't have any
20 conflict on August 6th. That will work.

21 THE COURT: Okay.

22 Here, I'm going to order that you catch your
23 breath -- well, that's not an order. But catch your
24 breath, but really work on this, you know, talk about
25 what's going to stay in the case. I think the plaintiff

1 -- you know, certain claims are going to be dismissed,
 2 what are you looking for in terms of damages if you
 3 ultimately -- well, what are you looking for in terms of
 4 damages or payments? And from the defendants'
 5 perspective, you know, do you want to do something to
 6 settle this case and if not, you know, what remains to
 7 be done and what's kind of the minimum reasonable period
 8 of time to do it? And the case started before Judge
 9 Lindsay, it went to Judge Young, and now it's mine.
 10 It's quite an old case. So it's complicated. And it's
 11 always my goal to decide matters orally, um, but it
 12 takes a while to get to it. But now you're on my radar
 13 screen.

14 And as I said frequently after studying the
 15 briefing and until you've educated me, um, I know what I
 16 should do and the argument tests it and makes things
 17 clearer, but this time, um, maybe it got harder. But I
 18 think the briefing was good, although it didn't
 19 distinguish between the defendants, um, and I think
 20 there were good reasons for it given all the facts I
 21 described.

22 But you should really now make a serious effort to
 23 determine -- well, and as part of my order, when you
 24 report on July 20th, if you're having settlement
 25 discussions and you'd like to go to mediation, tell me

1 that. You can go before one of our magistrate judges.
 2 It won't cost anything. Or you could go to somebody
 3 else. You might even go to me if you don't claim I'll
 4 be disqualified as a result of doing that. So you'll
 5 see it in the order. That's going to be the range of
 6 options. All right?

7 Anything further for today -- or tonight?

8 (Silence.)

9 THE COURT: All right. The Court is in
 10 recess.

11 (Ends, 6:15 p.m.)

12
 13 C E R T I F I C A T E

14
 15 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
 16 do hereby certify that the foregoing record is a true
 17 and accurate transcription of my stenographic notes,
 18 before Chief Judge Mark L. Wolf, on Wednesday, June 6,
 19 2012, to the best of my skill and ability.

20
 21
 22 /s/ Richard H. Romanow 06-13-12

23 RICHARD H. ROMANOW Date _____
 24
 25